APPENDIX A

29 T. C. No. 69

Docket No. 55272

TAX COURT OF THE UNITED STATES

General Retail Corporation (Delaware), *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Filed December 31, 1957

Corporation organized after 1945 but which acquired all its assets from parent corporation in business since 1925, *held*, to have commenced business prior to 1945 for excess profits tax purposes under section 430 (e), I.R.C. 1939, Excess Profits Tax Act of 1950, so as to be barred from preferential tax rate as a new corporation.

J. W. ALLEN, *Esq.*, and WILLIAM WALLER, *Esq.*, for the petitioner.

JACK D. YARBROUGH, *Esq.*, for the respondent.

Respondent determined a deficiency of $18,504.93 in petitioner's income (excess profits) tax for its taxable year ended October 31, 1951. The only issue is whether petitioner is entitled to compute its excess profits tax as a new corporation under section 430 (e) (1), Internal Revenue Code of 1939.

Findings of Fact

Certain facts are stipulated and are hereby found.

Petitioner, chartered under the laws of the State of Delaware on September 30, 1948, maintained its principal office at Nashville, Tennessee. Petitioner maintained its books and records on an accrual basis for fiscal years ended October 31. It filed corporate income tax returns from the fiscal year ended October 31, 1950 and 1951 with the collector of internal revenue for the district of Tennessee.

The incorporators elected the following directors of petitioner on September 30, 1948 to hold office for 1 year:

W. Maxey Jarman
W. M. Blackie
J. R. McCollum
F. M. Weisiger
B. P. Weisiger
E. L. Britain
W. Givan
E. C. Jones
K. Lawrence
P. C. Runyon
G. O. Petway

The directors on October 11, 1948, elected the following officers of petitioner to serve 1 year:

William Blackie, president
J. R. McCollum, executive vice president
F. M. Weisiger, vice president
E. L. Britain, vice president
W. Givan, secretary
E. D. Woods, treasurer

The individuals elected as directors and officers of petitioner also held the following positions with General Shoe Corporation, hereafter referred to as "General," during the period September 30 through December 31, 1948:

W. Maxey Jarman, chairman
W. M. Blackie, vice president
E. D. Woods, assistant comptroller
J. R. McCollum, employee
F. M. Weisiger, employee
B. P. Weisiger, employee
E. L. Britain, employee
W. Givan, employee
E. C. Jones, employee
K. Lawrence, employee
P. C. Runyon, employee
G. O. Petway, employee

Petitioner's authorized capital stock consisted of 1,000,000 shares, par value $1. The board of directors had discretionary authority to issue capital stock in such amounts and for such considerations as it determined. On October 21, 1948, the directors issued stock certificate

No. 1 for 1,000 shares in the name of Sarah A. Jarman, wife of W. Maxey Jarman.

On November 1, 1948, the stock certificate issued in the name of Sarah Jarman was transferred to General. General issued its check for $1,000 in payment for the stock. The stock certificate endorsed on November 1, 1948 over her signature discloses an irrevocable transfer for value received.

The stock certificate issued in the name of Sarah Jarman for 1,000 shares and a stock certificate for 10 shares, par value $100, issued to General under date of February 6, 1950, represented the only shares issued by petitioner. The stock certificate issued in the name of General replaced the certificate issued in the name of Sarah Jarman. General then owned all of the outstanding stock of petitioner. At that time individuals owning directly or indirectly 50 per cent or more in value of the outstanding stock or outstanding voting stock of General indirectly owned all outstanding stock of petitioner.

During November 1948, petitioner acquired from General several retail stores in Ohio. This acquisition consisted of assets acquired for their book value on the books of General, and for which General extended credit to petitioner on open account. The assets consisted of the following:

Inventories	$205,612.46
Leasehold improvements	138,813.51
Total	$344,425.97

The leasehold improvements had an adjusted basis for determining gain upon sale or exchange on December 1, 1950 of $51,916.99. It is stipulated that furniture and fixtures were also acquired, but no monetary value is assigned thereto.

The assets held by petitioner on December 1, 1950 consisted of the following:

Cash	$ 50,063.32
Inventories	329,677.84
Leasehold improvements	264,741.99
Total	$644,483.15

The adjusted basis for determining gain upon sale or exchange of leasehold for improvements on December 1, 1950 was $264,741.99.

Petitioner acquired a substantial part (all) of its assets from General during November 1948.

When General transferred the assets to petitioner, it owned all of the outstanding capital stock of petitioner. General commenced business in 1925 and has continuously engaged in business since that time.

Petitioner computed its excess profits tax for the fiscal year ended October 31, 1951 as a new corporation pursuant to section 430 (e) (1), Internal Revenue Code of 1939. Respondent determined that petitioner was not entitled to compute its excess profits tax for that fiscal year as a new corporation.

Petitioner is not a new corporation and did not commence business after July 1, 1945, within the meaning of section 430 (e), Internal Revenue Code of 1939, and is not entitled to compute its excess profits tax pursuant to the alternative method prescribed in section 430 (e) (1), Internal Revenue Code of 1939, relating to new corporations.

Opinion

OPPER, *Judge:* Petitioner claims to be entitled to the preferential tax treatment accorded "a new corporation" under section 430 (e), Internal Revenue Code of 1939, as

added by the Excess Profits Tax Act[1] of 1950. The facts are not in dispute. Petitioner acquired all of its assets from its parent, General, and while petitioner concededly commenced business after July 1, 1945, General had been operating since 1925. Petitioner says that its stock was owned by General and not by General's stockholders, and respondent insists that the rule of attribution requires that petitioner's stock be considered as being held by General's stockholders.

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[1] "(e) New Corporations.—

"(1) Alternative Amount.—In the case of a taxpayer which commenced business after July 1, 1945, and whose fifth taxable year ends after June 30, 1950, the amount referred to in subsection (a) (3) shall be—

" • • • • • • •

"(B) If the taxable year is the third taxable year of the taxpayer, an amount equal to 8 per centum of the excess profits net income for the taxable year, except that if the excess profits net income exceeds $300,000, the amount shall be the sum of $24,000 plus the amount determined under subparagraph (E) of this paragraph.

" • • • • • • •

"(2) First Five Taxable Years.—For the purpose of this subsection—

"(A) The taxable year in which the taxpayer commenced business and the first, second, third, and fourth succeeding taxable years shall be considered its first, second, third, fourth, and fifth taxable years, respectively.

"(B) The taxpayer shall be considered to have been in existence and to have had taxable years for any period during which it or any corporation described in any clause of this subparagraph was in existence, and the taxpayer shall be considered to have commenced business on the earliest date on which it or any such corporation commenced business:

"(i) Any corporation which during or prior to the taxable year was a party with the taxpayer to a transaction described in section 445 (g) (2) (A), (B), or (C), determined as if the date 'July 1, 1945' were substituted for the date 'December 1, 1950' in section 445 (g) (2) (C)."

What the issue really comes down to is whether the formula of section 503 can and must be imported into section 430 (e). The statute says in effect that corporations can qualify under section 430 (e) as having "commenced business" only if they would likewise so qualify as described in[2] section 445. Section 445 expressly requires for

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[2] "SEC. 445. AVERAGE BASE PERIOD NET INCOME—NEW CORPORATION.

"(a) New Corporation.—A taxpayer which commenced business after the first day of its base period shall, except as provided in subsection (g), be considered a new corporation for the purposes of this section, and its average base period net income determined under this section shall be the amount computed under subsection (b).

" • • • • • • •

"(g) Ineligible Corporations.—

"(1) If a taxpayer, on or after December 1, 1950, and prior to the end of its third taxable year, acquires any properties in any of the transactions described in paragraph (2), it shall not, for the taxable year in which such acquisition occurs or for succeeding taxable years, be entitled to the benefits of this section except under the circumstances and subject to the limitations provided in section 462 (g).

"(2) The transactions to which paragraph (1) applies are as follows:

" • • • • • • •

"(B) The acquisition by the taxpayer of a substantial part of its assets from another corporation, or of a substantial part of the properties of another corporation, if 50 per centum or more in value of the outstanding stock or outstanding voting stock of the taxpayer is directly or indirectly owned, at the time of such acquisition, by individuals owning directly or indirectly 50 per centum or more in value of the outstanding stock, or outstanding voting stock of the transferor;

" • • • • • • •

"(3) For the purposes of this subsection, the provisions of section 503 shall be applicable in the determination of ownership of stock."

its application the use of the principle[3] of section 503. We fail to see, therefore, how a corporation can have the benefits of not having commenced business before July 1, 1945, under section 445 without applying section 503; and if not a corporation which commenced business after 1945 under section 445, it does not qualify for the benefits of section 430 (e), where section 445 (g) applies as it does here.

In order to clarify what we think is the consequently inevitable effect of the interconnected statutory provisions, we set forth below a paraphrased version of the interplay of the three sections and their application to petitioner's situation:

> In the case of * * * [petitioner if it] commenced business [as limited below] after July 1, 1945, and * * * [its] fifth taxable year ends after June 30, 1950, the amount * * * [of excess profits tax] shall be [4] [computed at a preferential rate].
>
> [Petitioner] * * * shall be considered to have been in existence and to have had taxable years for any period during which [General,] * * * was in existence, and * * * [petitioner] shall be [then] considered to have commenced business [in 1925,[5]] * * * the earliest date on which * * * [General] commenced business: [6]

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[3] "SEC. 503. STOCK OWNERSHIP.

"(a) Constructive Ownership.—For the purpose of determining whether a corporation is a personal holding company, insofar as such determination is based on stock ownership under section 501 (a) (2), section 502 (e), or section 502 (f)—

"(1) Stock Not Owned by Individual.—Stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries."

[4] Section 430 (e) (1).

[5] As stipulated.

[6] Section 430 (e) (2) (B).

[if General] * * * during or prior to the [year end October 31, 1951] * * * was a party with * * * [petitioner] to a transaction described * * * [7] [as:]

The acquisition by * * * [petitioner] of * * * its assets from * * * [General], if * * * the outstanding stock * * * of * * * [petitioner] is * * * [considered as] owned, at the time of such acquisition, by individuals owning * * * [proportionally] 50 per centum or more in value of the outstanding stock * * * of * * * [General;[8] by reason that] stock [of petitioner] owned, * * * by * * * [General] * * * shall be considered as being owned proportionately by [General's] shareholders * * * [9]

Opinion

We think it inevitably follows that respondent is correct that petitioner cannot qualify as having commenced business after July 1, 1945; that section 430 (e) is accordingly inapplicable, and that, as a consequence, the deficiency was correctly determined. With such a clear statutory command, the legislative history is not available even were it more persuasive than is the present case. *John H. Watson, Jr.*, 27 B.T.A. 463, 465.

Decision will be entered for the respondent.

(Caption Omitted)

Decision

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed December 31, 1957, it is ORDERED AND DECIDED: That there is a deficiency

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[7] Section 430 (e) (2) (B) (i).

[8] Section 445 (g) (2) (B).

[9] Section 503 (a) (1), made applicable by section 445 (a) (3).

in income (excess profits) tax for the taxable year ended October 31, 1951 in the amount of $18,504.93.

Entered: Jan. 3, 1958.

(Signed) CLARENCE V. OPPER,
Judge.

(Caption Omitted)

Petition for Review of Decision of the Tax Court of the United States

(Filed February 19, 1958)

To the Honorable Judges of the United States Court of Appeals for the Sixth Circuit:

General Retail Corporation, the petitioner in this cause, by William Waller, counsel, hereby files its petition for review by the United States Court of Appeals for the Sixth Circuit of the decision entered by the Tax Court of the United States on January 3, 1958, ordering and deciding that there is a deficiency in petitioner's income (excess profits) tax for the taxable year ended October 31, 1951, in the amount of $18,504.93.

Petitioner is a Delaware corporation with its principal office in Nashville, Davidson County, Tennessee. The return for the period here involved was filed with the Director of Internal Revenue at Nashville, Tennessee, whose office is within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. This petition for review is filed pursuant to the provisions of Sections 7482 and 7483 of the Internal Revenue Code of 1954.

/s/ WILLIAM WALLER
American Trust Building
Nashville 3, Tennessee
Attorney for Petitioner

Judgment

(Filed January 2, 1959)

The sole issue on this appeal is whether the petitioner taxpayer is entitled to the preferential treatment accorded to new corporations by section 430(e) of the Internal Revenue Code of 1939, as added by section 501 of the Revenue Act of 1951, c. 521, 65 Stat. 452, relating to Korean War excess profits taxes. The decision of this issue involves the construction and application of section 430(e) and also sections 445(g) and 503.

The Tax Court in a concise and convincing opinion by Judge Opper decided that the "clear statutory command" barred the taxpayer from such preferential tax treatment. 29 T.C. 632. We agree.

The decision of the Tax Court is affirmed.

Order Denying Petition for Rehearing

(Filed February 11, 1959)

The petition of General Retail Corporation for rehearing of the judgment entered January 2, 1959, having been duly considered, and it appearing that no good reason for granting a rehearing is therein set forth, the petition is denied.

APPENDIX B

Statutes Involved

(Internal Revenue Code of 1939, as amended by Excess Profits Tax Act of 1950 and Section 501, Revenue Act of 1951).*

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* Sections 430 to 472, inclusive, were added to the Internal Revenue Code of 1939 by Section 101 of the Excess Profits Tax Act of 1950, and made effective with respect to taxable years ending after

Section 430(a) General Rule.—"In addition to other taxes imposed by this chapter, there shall be levied, collected, and paid for each taxable year ending after June 30, 1950, and beginning before July 1, 1953, upon the adjusted excess profits net income, as defined in section 431, of every corporation (except a corporation exempt under section 454) an excess profits tax equal to whichever of the following amounts is the lesser:

* * *

"(3) in the case of a corporation for which an amount is determined for the taxable year under subsection (e), the amount determined under such subsection.

* * *

"(e) New Corporations.

"(1) Alternative Amount.—In the case of a taxpayer which commenced business after July 1, 1945, and whose fifth taxable year ends after June 30, 1950, the amount referred to in subsection (a)(3) shall be—

* * *

"(B) If the taxable year is the third taxable year of the taxpayer, an amount equal to 8 per centum of the excess profits net income for the taxable year, except that if the excess profits net income exceeds $300,000, the amount shall be the sum of $24,000 plus the amount determined under subparagraph (E) of this paragraph.

* * *

"(2) First Five Taxable Years.—For the purpose of this subsection.

"(A) The taxable year in which the taxpayer commenced business and the first, second, third, and fourth succeeding

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June 30, 1950. Section 430(e) was added by Section 501 of the Revenue Act of 1951, which changed former subparagraph (e) to the subparagraph (f). The 1951 amendments were also made applicable to taxable years ending after June 30, 1950.

taxable years shall be considered its first, second, third, fourth, and fifth taxable years, respectively.

"(B) The taxpayer shall be considered to have been in existence and to have had taxable years for any period during which it or any corporation described in any clause of this subparagraph was in existence, and the taxpayer shall be considered to have commenced business on the earliest date on which it or any such corporation commenced business:

"(i) Any corporation which during or prior to the taxable year was a party with the taxpayer to a transaction described in section 445 (g)(2)(A), (B), or (C), determined as if the date 'July 1, 1945' were substituted for the date 'December 1, 1950' in section 445 (g)(2)(C).

"(ii) Any corporation if a group of not more than four persons who control the taxpayer at any time during the taxable year also controlled such corporation at any time during the period beginning twelve months preceding their acquisition of control of the taxpayer and ending with the close of the taxable year; but only if at any time during such period (and while such persons controlled such corporation) such corporation was engaged in a trade or business substantially similar to the trade or business of the taxpayer during the taxable year. For the purpose of this clause, the term 'control' means the ownership of more than 50 per centum of the total combined voting power of all classes of stock entitled to vote, or more than 50 per centum of the total value of shares of all classes of stock. A person shall not be considered a member of the group referred to in this clause unless during the period referred to in this clause he owns stock in such corporation at a time when the members of the group control such corporation and he owns stock in the taxpayer at a time when the members of

the group control the taxpayer. For the purpose of this clause, the ownership of stock shall be determined in accordance with the provisions of section 503, except that constructive ownership under section 503 (a)(2) shall be determined only with respect to the individual's spouse and minor children.

* * *

If as of the beginning of December 1, 1950, the adjusted basis for determining gain upon sale or exchange of the aggregate assets theretofore acquired by the taxpayer in transaction described in clauses (i) and (iii) (or acquired in the ordinary course of business in replacement of such assets) and held by it at such time constituted less than 20 per centum of the adjusted basis for determining gain upon sale or exchange of its total assets held at such time, then transactions described in such clauses occurring prior to such date shall be disregarded in determining the date as of which the taxapyer shall be considered to have commenced business.

* * *

Section 445. Average Base Period Net Income—New Corporation.

"(a) New Corporation.—A taxpayer which commenced business after the first day of its base period shall, except as provided in subsection (g), be considered a new corporation for the purposes of this section, and its average base period net income determined under this section shall be the amount computed under subsection (b).

* * *

"(g) Ineligible Corporations.

"(1) If a taxpayer, on or after December 1, 1950, and prior to the end of its third taxable year, acquires any properties in any of the transactions described in paragraph (2), it shall not, for the taxable year in which such acquisition occurs or for succeeding taxable years, be en-

titled to the benefits of this section except under the circumstances and subject to the limitations provided in section 462(g).

"(2) The transactions to which paragraph (1) applies are as follows:

"(A) The acquisition by the taxpayer from another corporation of properties the basis of which in its hands is determined by reference to the basis of such properties to the transferor;

"(B) The acquisition by the taxpayer of a substantial part of its assets from another corporation, or of a substantial part of the properties of another corporation, if 50 per centum or more in value of the outstanding stock or outstanding voting stock of the taxpayer is directly or indirectly owned, at the time of such acquisition, by individuals owning directly or indirectly 50 per centum or more in value of the outstanding stock, or outstanding voting stock of the transferor;

"(C) The acquisition by the taxpayer of a substantial part of the properties distributed on or after December 1, 1950, by another corporation, if such properties constituted a substantial part of the business assets of such other corporation, and if 50 per centum or more in value of the outstanding stock or outstanding voting stock of the taxpayer is owned directly or indirectly by individuals who at the time of such distribution owned directly or indirectly 50 per centum or more in value of the outstanding stock or outstanding voting stock of such other corporation;

"(3) For the purposes of this subsection, the provisions of section 503 shall be applicable in the determination of ownership of stock.

* * * *

Section 503. Stock Ownership.

"(a) Constructive Ownership.—For the purpose of determining whether a corporation is a personal holding company, insofar as such determination is based on stock ownership under section 501 (a)(2), section 502 (e), or section 502 (f)—

"(1). Stock Not Owned by Individual.—Stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries.